SUPREME COURT, U.S.
FILED
JUL 28 1995
OFFICE OF THE CLERK

No. 95 170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—v.—

PORTER F. BANKS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the stop of a motor vehicle, which is based upon probable cause to believe that the operator of such vehicle has violated a provision of the state vehicle and traffic law, constitute a "limited seizure" of the person under the Fourth Amendment, where state law authorizes a custodial arrest for such violations?

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OPINIONS BELOW

The opinion of the New York Court of Appeals appears at 85 NY2d 558 and is included in the appendix at pages 1-5. The opinion of the Appellate Division of the New York Supreme Court, Third Judicial Department appears at 202 AD2d 902 and is included at pages 6-12 of the appendix. The decision of the Supreme Court is not reported and is included in the appendix at pages 13-19.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States Supreme Court is invoked pursuant to Title 28 USCA § 1257(3) in that the People seek review of the decision and order of the New York State Court of Appeals rendered May 4, 1995 which reversed the order of the Appellate Division of the New York State Supreme Court affirming the judgment of conviction entered in the Supreme Court, Albany County and granted defendant's motion to suppress tangible evidence seized on the ground that evidence used against the defendant was acquired as a result of an illegal seizure of the defendant under the Fourth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

STATUTES INVOLVED

New York Vehicle and Traffic Law § 155—The entire text of the statute is included in the appendix at pages 25-26.

New York Vehicle and Traffic Law § 1229-c—The entire text of the statute is included in the appendix at pages 26-28.

New York Criminal Procedure Law § 140.10—The entire text of the statute is included in the appendix at pages 28-31.

STATEMENT OF THE CASE

On September 14, 1991, while parked in a marked patrol car in the median of the New York State Thruway in Albany County, New York, Trooper Carlos Cuprill of the New York State Police observed a blue Chevrolet travelling northbound at 54 miles per hour. Trooper Cuprill observed that the driver, later identified as Robert Jones, was not wearing his seatbelt.[1] The trooper pursued and stopped the vehicle about two miles beyond the point of initial observation. Upon pulling off the highway behind the vehicle, Trooper Cuprill observed an individual, later identified as defendant Porter Banks, sit up from a reclining position in the passenger front seat, apparently also not wearing a seatbelt.

Trooper Cuprill asked the driver, co-defendant Jones, to exit the Chevrolet with his operator's license and vehicle registration and accompany him to the rear of the vehicle. Jones produced a non-picture New York operator's license issued to a "Thomas Cooper".[2] He also produced a rental agreement for the Chevrolet naming defendant as lessee. Cuprill informed Jones that he was stopped for a seatbelt violation and then asked Jones where he came from and where he was going. Jones replied that he was returning to Buffalo from New York City after dropping off his niece at college, in a one-day round trip. The trooper instructed Jones to return to his vehicle but retained his license and the rental document.

Trooper Cuprill then instructed defendant to exit from the front passenger seat and come to the rear of the Chevrolet. Defendant produced a valid New York driver's license in his

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[1] New York Vehicle and Traffic Law § 1229-c(3) provides: "No person shall operate a motor vehicle unless such person is restrained by a safety belt approved by the commissioner. No person sixteen years of age or over shall be a passenger in the front seat of a motor vehicle unless such person is restrained by a safety belt approved by the commissioner".

[2] Jones' true identity was not discovered until after he and defendant were arrested.

name. Cuprill observed that defendant appeared to be very nervous and agitated, staring at the trooper's sidearm. Asked about the origin and destination of their trip, defendant indicated they were enroute from the New York/New Jersey area, had spent a couple of days in New York City and were returning to the Buffalo area. The trooper told defendant to return to his vehicle, but also retained defendant's operator's license. Cuprill went back to the troop car and ran a license suspension revocation check on the licenses presented by defendant and Jones and on the status of the vehicle, all of which came back negative. He then started to write up two tickets for seatbelt violations. Instead of issuing them, however, he decided that he "wanted to go through the vehicle" and radioed for a backup officer in order to perform a possible vehicle search.

Defendant and Jones waited in the Chevrolet without being told the reason for the delay. When a backup trooper arrived, Trooper Cuprill used his public address system to order Jones to return to the troop car. Cuprill handed Jones the two traffic tickets and asked him whether his car contained weapons or drugs. Jones replied no, but that they could go ahead and look. Cuprill then filled out a State Police Consent to Search form and handed it to Jones, who signed it. The search that followed disclosed a bag under the driver's seat containing 1/2 of a kilogram of cocaine.

Defendant was charged by an indictment with the crime of criminal possession of a controlled substance in the first degree. Following a hearing, defendant's motion to suppress tangible evidence seized was denied. The trial court found that the stop of defendant's vehicle for a violation of not wearing a seatbelt was justified. The court further found that the detention and questioning of defendant was proper based upon the conflicting responses given by defendant and Robert Jones as well as defendant's apparent nervousness. Based upon these findings, the court determined that the consent given by Jones was not the product of unlawful police conduct and was voluntarily given.

A majority of the Appellate Division of the Supreme Court affirmed, finding the consent given by Jones voluntary. The Court of Appeals reversed, holding that a traffic stop constitutes a limited seizure of the person of the occupant of a vehicle. The court determined that in order for a traffic stop to pass constitutional muster, the officer's action in stopping the vehicle must be justified at its inception, and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance, citing *United States v Sharpe*, 470 US 675 and *Florida v Royer*, 460 US 491. However, the cases cited by the Court of Appeals are ones which pertain to stops of motor vehicles on less than probable cause. The Court of Appeals did not specifically address the issue of whether a stop of a vehicle based upon probable cause to believe the operator has violated the Vehicle and Traffic Law constitutes a limited seizure.

The Court of Appeals determined that the information acquired by the police officer during the course of the stop was not sufficient to establish a reasonable suspicion that criminal activity was afoot so as to justify the detention of defendant beyond the time necessary to issue traffic citations and perform a license check. The Court of Appeals determined that the detention of the defendant herein was a "seizure" in violation of defendant's constitutional rights, notwithstanding the fact that defendant had already been seized. The Court of Appeals held that the consent given by Robert Jones was the product of an illegal seizure and reversed the order affirming the judgment of conviction and ordered defendant's motion to suppress be granted and dismissed the indictment.

POINT I

THE STOP OF A MOTOR VEHICLE BASED UPON PROBABLE CAUSE THAT THE OPERATOR HAS VIOLATED SOME PROVISION OF THE VEHICLE AND TRAFFIC LAW IS NOT A LIMITED SEIZURE UNDER THE FOURTH AMENDMENT

The instant petition presents the question which was alluded to in a footnote in this Court's decision in *Berkemer v McCarty*, 468 US 420, but not decided by the Court: Whether a traffic stop based upon probable cause constitutes a limited seizure of the person under the Fourth Amendment. In *Berkemer*, this Court determined that investigatory questioning of an individual suspected of violating traffic laws need not be preceded by *Miranda* warnings. This Court reasoned that those factors which underlie the *Miranda* decision were not present in the context of roadside questioning. This Court thereafter analogized the roadside questioning to a *Terry* detention. However, in a footnote, this Court cautioned against relying too heavily upon the analogy. This Court stated:

> "No more is implied by this analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*. We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop."

Berkemer v McCarty, 468 US at 439 (n29).

In its decision reversing the judgment of conviction entered in the instant case, the Court of Appeals held that a traffic stop constitutes a limited seizure of the person of each occupant of an automobile. The Court further found that in order to pass constitutional muster, "the officer's action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first

instance", citing *United States v Sharpe*, 470 US 675. However, *Sharpe*, involved an investigatory stop based upon reasonable suspicion rather than probable cause.

In the instant case, the police officer observed a violation of the New York Vehicle and Traffic Law committed in his presence. New York State law authorizes a custodial arrest for vehicle and traffic violations.[3] It is respectfully submitted that under such circumstances the seizure of the occupant of a motor vehicle is not limited in scope under the Fourth Amendment. Rather, the only limitations placed upon the seizure of the individual are those set by statutes regulating the procedures attendant to seizures for traffic violations.

A number of federal courts have seized upon the analogy to the *Terry* detention which this Court used in *Berkemer*, 468 US at 439 to justify a holding that vehicle and traffic stops are "limited seizures" under the Fourth Amendment where state law does not authorize a custodial arrest for traffic violations.[4] However, whether such seizures are "limited" is more a function of the statutory authority granted to the police officer than the parameters set by the Fourth Amendment. Indeed, this Court has previously held that a search incident to a lawful arrest for a vehicle and traffic violation is reasonable under the Fourth Amendment. *Gustafson v Florida*, 414 US 260; *United States v Robinson*, 414 US 218. Implicit in such holding is that a seizure based upon probable cause to believe that an individual has committed a traffic

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[3] New York Vehicle and Traffic Law § 155 provides in part: "For the purposes of arrest without a warrant, pursuant to article One Hundred Forty of the criminal procedure law, a traffic infraction shall be deemed an offense".

New York Criminal Procedure Law § 140.10(1)(a) provides: "Subject to the provisions of subdivision two, a police officer may arrest a person for: any offense when he has reasonable cause to believe that such person has committed such offenses in his presence. . . ."

[4] *United States v Guzman*, 864 F2d 1512 (10th Cir 1988); *United States v Cummins*, 920 F2d 489 (8th Cir 1990).

offense is not in any way limited under the Fourth Amendment.

In the instant case, the New York Court of Appeals found that the detention of the defendant and his co-defendant alongside the road was excessive in its duration under the Fourth Amendment. The Court thereafter determined that the consent to search given by defendant's co-defendant was invalid as the product of an "illegal" detention. It is respectfully submitted that the determination by the New York Court of Appeals that the seizure of an individual based upon probable cause that such individual has violated a traffic law is a limited seizure under the Fourth Amendment is erroneous. Accordingly, the People respectfully pray that the instant petition for a writ of certiorari be granted.

CONCLUSION

The People respectfully pray that the People's petition for a Writ of Certiorari be granted.

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APPENDIX

NEW YORK STATES COURT OF APPEALS

3 No. 75

THE PEOPLE &C.,

Respondent,

—v.—

PORTER F. BANKS,

Appellant.

MICHAEL H. SUSSMAN, *for appellant.*

PAUL A. CLYNE, *for respondent.*

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

LEVINE, J.:

Defendant and codefendant Robert Jones were indicted for criminal possession of a controlled substance in the first degree arising out of the seizure of a large quantity of cocaine from an automobile defendant had rented. At the suppression hearing in the case, Trooper Cuprill of the State Police, the sole People's witness, testified as follows. About 1:00 P.M. September 14, 1991, while parked in a marked patrol car in the median of the Thruway located in the Town of Bethlehem, Albany County, the trooper observed a northbound blue

Chevrolet pass by at a speed clocked by radar of 54 miles per hour. Trooper Cuprill observed that the driver was not wearing his seatbelt. The trooper pursued and stopped the vehicle about two miles beyond the point of initial observation. Upon pulling off the highway behind the Chevrolet, Cuprill observed defendant sit up from a reclining position in the passenger front seat, apparently also not wearing a seatbelt.

Trooper Cuprill asked the driver, co-defendant Jones, to exit the Chevrolet with his operator's license and vehicle registration and accompany him to the rear of the vehicle. Jones produced a non-picture New York operator's license issued to a "Thomas Cooper"[1]. He also produced a rental agreement for the Chevrolet naming defendant as lessee. Cuprill informed Jones that he was stopped for a seatbelt violation and then asked Jones where he came from and where he was going. Jones replied that he was returning to Buffalo from New York City after dropping off his niece at college, in a one-day round trip. The trooper instructed Jones to return to his vehicle but retained his license and the rental document.

Trooper Cuprill then instructed defendant to exit from the front passenger seat and come to the rear of the Chevrolet. Defendant produced a valid New York driver's license in his name. Cuprill observed that defendant appeared to be very nervous and agitated, staring at the trooper's sidearm. Asked about the origin and destination of their trip, defendant indicated they were enroute from the New York/New Jersey area, had spent a couple of days in New York City and were returning to the Buffalo area. The trooper told defendant to return to his vehicle, but also retained defendant's operator's license. Cuprill went back to the troop car, and ran a license suspension revocation check on the licenses presented by defendant and Jones and on the status of the vehicle, all of which came back negative. He then started to write up two tickets for seatbelt violations. Instead of issuing them, however, he decided

---

[1] Jones' true identity was not discovered until after he and defendant were arrested.

that he "wanted to go through the vehicle" and radioed for a backup officer in order to perform a possible vehicle search.

Defendant and Jones waited in the Chevrolet without being told the reason for the delay. When a backup trooper arrived, Trooper Cuprill used his public address system to order Jones to return to the troop car. Cuprill handed Jones the two traffic tickets and asked him whether his car contained weapons or drugs. Jones replied no, but that they could go ahead and look. Cuprill then filled out a State Police Consent to Search form and handed it to Jones, who signed it. The search that followed disclosed a bag under the driver's seat containing 1/2 of a kilogram of cocaine.

Supreme Court denied defendant's motion to suppress the cocaine seized by the State Police. It held that the initial stop of the vehicle occupied by defendant was justified by Trooper Cuprill's observation of the seatbelt violation. The court further held that the inconsistencies in defendant's and Jones' responses to questions on the origin, length and destination of their trip and defendant's nervousness during questioning raised a reasonable suspicion of criminality on their part, justifying continued detention. Finally, Supreme Court upheld the validity of Jones' consent, concluding that Jones had authority to give consent to the search of the vehicle and did so voluntarily. The Appellate Division affirmed (202 AD2d 902) with two Justices dissenting. The case is before us by leave of a Justice of that Court.

We now reverse. The search in this case was the product of an inseparable illegal detention of defendant and Jones. Defendant, as the lessee of the automobile searched, had a possessory interest in, dominion and control over and the right to exclude others from the vehicle. Hence, defendant clearly had a legitimate expectation of privacy with respect to the interior of the vehicle and its contents sufficient to give him standing to challenge the search and seizure (*Rakas v Illinois*, 439 US 128, 149; *People v Wesley*, 73 NY2d 351, 357).

A traffic stop constitutes a limited seizure of the person of each occupant (*People v May*, 81 NY2d 725, 727; *People v Harrison*, 57 NY2d 470, 176). For a traffic stop to pass

constitutional muster, the officer's action in stopping the vehicle must be justified at its inception and the seizure must be reasonably related in scope, including its length, to the circumstances which justified the detention in the first instance (*United States v Sharpe*, 470 US 675, 682; *see also*, *Florida v Royer*, 460 US 491, 500 [plurality opn]). While the stop was justified in the instant case, the length and circumstances of the detention were not. Consequently, the evidence ultimately seized must be suppressed (*compare*, *People v Milaski*, 62 NY2d 147).

Trooper Cuprill's observations of Jones' seatbelt violation justified the initial stop of Jones and defendant in the vehicle. However, once Cuprill's license and stolen vehicle radio check came back negative and he prepared the traffic tickets for the seatbelt violations, the initial justification for seizing and detaining defendant and Jones was exhausted (*see, People v Milaski*, 62 NY2d, at 156, *supra)*. The trooper nevertheless retained their licenses, effectively forcing them to remain at the scene while he awaited the appearance of the backup trooper he had requested. This continued involuntary detention of defendant and Jones and their vehicle constituted a seizure in violation of their constitutional rights, unless circumstances coming to Cuprill's attention following the initial stop furnished him with reasonable suspicion that they were engaged in criminal activity (*People v Milaski*, *supra*, 62 NY2d, at 156; *see also*, *People v May*, 81 NY2d 725, 727, *supra*; *United States v Ramos*, 20 F3d 348, 352 [8th Cir]). Contrary to the holdings of the courts below, defendant's nervousness and the innocuous discrepancies in his and Jones' answers to the trooper's questions regarding the origin, destination and timing of their trip did not alone, as a matter of law, provide a basis for reasonable suspicion of criminality (*People v Milaski*, 62 NY2d, at 156, *supra*).

The illegal detention of defendant and Jones in this case requires suppression of the evidence seized in the search of their vehicle. Trooper Cuprill readily admitted that he delayed issuing the traffic tickets and returning the licenses and rental agreement to defendant and Jones for the specific purpose of

effecting a search of the automobile. The consent to search was obtained during or immediately after that extended detention and without any intervening circumstances. Thus, under no rational view of the evidence at the suppression hearing can it be concluded that Jones' consent was acquired by means sufficiently distinguishable from the taint of illegal detention (*see, Florida v Royer*, 460 US 491, 507-508; *see also, People v Hollman*, 79 NY2d 181, 194; *People v Gonzalez*, 39 NY2d 122, 128; *United States* v *Ramos, supra*, 20 F3d, at 352-353; *cf., People v Borges*, 69 NY2d 1031).

Accordingly, the order of the Appellate Division should be reversed, defendant's motion to suppress granted and the indictment dismissed.

* * *

Order reversed, defendant's motion to suppress granted and indictment dismissed. Opinion by Judge Levine. Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Smith and Ciparick concur.

Decided May 4, 1995

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Calendar Date: January 18, 1994
Decided and Entered: March 24, 1994

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—v.—

PORTER F. BANKS,

Appellant.

Before: CARDONA, P.J., MERCURE, WHITE, CASEY and WEISS, JJ.

MICHAEL H. SUSSMAN (Scott A. Thornton of counsel), Goshen, *for appellant*.

SOL GREENBERG, District Attorney (Risa Viglucci of counsel), Albany, *for respondent*.

MEMORANDUM AND ORDER

CARDONA, P.J.

Appeal from a judgment of the County Court of Albany County (Doyle, J.), rendered November 30, 1992, upon a verdict convicting defendant of the crime of criminal possession of a controlled substance in the first degree.

On September 14, 1991 at approximately 1:00 P.M., State Trooper Carlos Cuprill, while sitting in his marked patrol car located in the median of the Thruway at mile marker 134 in the Town of Bethlehem, Albany County, observed a rented blue Chevrolet Corsica traveling northbound. Using radar, Cuprill confirmed the car's speed at 54 miles per hour. He observed that the driver, codefendant Robert K. Jones, was not wearing his seatbelt. Cuprill then pulled out into traffic and stopped the vehicle approximately two miles from the point of initial observation. Upon stopping the vehicle, Cuprill observed defendant sit up in the front passenger seat where he had apparently been sleeping or resting. Cuprill noticed that defendant was not wearing a seatbelt.

Cuprill requested that Jones exit and step to the rear of the vehicle. Jones complied. Cuprill then asked Jones for a driver's license and registration. Jones produced a rental agreement for the vehicle which indicated that it had been rented by Porter Banks. Jones also produced a non-photo New York driver's license under the name Thomas Cooper. Cuprill informed Jones that he stopped him because he was not wearing his seatbelt. Cuprill then asked Jones where he was coming from and where he was going. According to Cuprill, Jones replied that "he was coming from the New York City area en route to the Buffalo area, and that he had just dropped off his niece, who was going to college in New York City, that it was a day trip and he had just come down that morning". Cuprill asked Jones to have a seat in the vehicle and Jones complied.

Cuprill approached the passenger side of the vehicle and asked defendant to exit the vehicle. Defendant went back to the rear of the vehicle. There he produced a New York photo driver's license in the name of Porter Banks. Cuprill began to question defendant. Cuprill asked defendant where he was coming from and where he was going. Defendant stated "I'm with him". Cuprill asked, "the driver?" and defendant answered "yes". Cuprill asked, "Are you coming from New York or New Jersey?" Defendant answered "yes". Cuprill observed that defendant was six feet, one inch tall, over 300 pounds, appeared nervous and agitated, and continually stared at his sidearm. Cuprill again asked defendant where he was

coming from and where he was going. Defendant indicated that he was coming from the New York/New Jersey area and that he had spent a couple of days in New York City with Jones. Cuprill asked defendant if he had any luggage. Cuprill then asked defendant to have a seat in the vehicle and defendant complied.

Cuprill went back to his patrol car and ran a suspension and revocation check on Jones and defendant and a license plate check on the vehicle. The results came back negative as to each. Cuprill started to write out summonses for failure to wear seat belts but then called for back-up, indicating a need for a possible vehicle search. Trooper Darren Donnelly responded to the scene. Upon his arrival Donnelly joined Cuprill, who informed him about the conversations he had with Jones and defendant. Cuprill called Jones to the patrol car, gave him the citations and then asked Jones "if he had anything in the car that he wasn't supposed to have, guns, weapons or drugs". Jones indicated that he did not and that Cuprill could go ahead and look. Cuprill then filled out a State Police consent to search form and gave it to Jones, who signed it. Cuprill then requested defendant to exit the vehicle. Both individuals were patted down for weapons. A search of the vehicle revealed a quantity of cocaine under the driver's seat.

Defendant was arrested and subsequently indicted for criminal possession of a controlled substance in the first degree. Following a suppression hearing, County Court denied defendant's motion to suppress the cocaine. Following a jury trial, defendant was convicted of the charged crime and was sentenced to an indeterminate prison term of 15 years to life. Defendant appeals.

We first address the issue of defendant's standing to suppress the cocaine seized from the car. The People raise the standing issue for the first time on this appeal. Although it is arguable that they are now precluded from raising it with respect to defendant's 4th Amendment challenge (*see*, *Steagald v United States*, 451 US 204, 208-209), they are not precluded from doing so with respect to that branch of defendant's motion which challenges the search and seizure

under State constitutional law. CPL 710.60 codifies our State constitutional law requirement that a person demonstrate a personal expectation of privacy in the searched premises (*see*, *People v Wesley*, 73 NY2d 351, 357-359). The statute places on a defendant seeking suppression the initial burden to allege facts sufficient to warrant suppression (*id.*, at 358-359). Because that burden includes a showing of standing (*id.*), the People are not precluded from raising the issue for the first time on appeal (*see*, *People v Jones*, 182 AD2d 1066; *People v Sanchez-Reyes*, 172 AD2d 1034, *lv denied* 78 NY2d 926). In any event, the circumstances of this case establish that defendant had a personal legitimate expectation of privacy in the area underneath the seats because the rental agreement gave him a possessory interest in the vehicle (*cf.*, *Rakas v Illinois*, 439 US 128, 140, 148-149; *People v Wesley*, *supra*, at 357).[1]

Defendant's first challenge to the validity of the seizure is that the stop itself wag pretextual and therefore invalid (*see*, *People v Melendez*, 195 AD2d 856; *People v Smith*, 181 AD2d 802; *People v Letts*, 180 AD2d 931, *appeal dismissed* 81 NY2d 833; *People v Mikel*, 152 AD2d 603). We disagree. Cuprill's credited testimony (*see*, *People v Prochilo*, 41 NY2d 759, 761) that he observed the commission of the traffic offense of failure to wear a seatbelt (Vehicle and Traffic Law § 1229-c [3]) authorized him to stop defendant's vehicle (*see*, *People v Letts*, *supra*, at 943; *see also*, *People v Robinson*, 74 NY2d 773, *cert denied* 493 US 966; *People v Carter*, ___ AD2d ___ [Dec. 30, 1993]; *People v Sora*, 176 AD2d 1172, 1172-1173, *lv denied* 79 NY2d 864). There is no evidence demonstrating that either Jones or defendant was under investigation by the State Police prior to the stop (*see*, *id.*). The stop was effected contemporaneously with the commission of the traffic offense. Furthermore, Cuprill's initial inquiry of the driver was directed, appropriately, to a request for a driver's license and vehicle registration, and finally,

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[1] This case presents no issue of automatic standing to challenge the search of the vehicle inasmuch as defendant was not charged with criminal possession of a controlled substance under a statutory presumption (*see*, Penal Law § 220.25 [1]; *People v Drakes*, 17S AD2d 841; *see also*, *People v Wesley*, *supra*).

summonses were issued for the subject traffic offense. In short, this record lacks a clear demonstration that the reason for the stop was to investigate Jones or defendant on a matter wholly unrelated to the traffic infraction (*see, People v Letts, supra*, at 934).

Although the stop of the vehicle for a violation of the Vehicle and Traffic Law was lawful, the search itself, as the People acknowledge, cannot be justified solely on this basis (*see, People v Class*, 63 NY2d 491, 496, *revd on other grounds* 475 US 106; *People v Sora, supra*; *People v Mercado*, 165 AD2d 910, *lv denied* 76 NY2d 988). The People contend that the search was justified by the voluntary consent obtained from Jones. Defendant contends, however, that the consent was the product of an impermissible police detention and inquiry and therefore was invalid (*see, People v Hollman*, 79 NY2d 181).

The seatbelt violations provided Cuprill with an articulable reason to detain the vehicle's occupants to check the driver's license and vehicle registration and to request information from each occupant concerning his identification, destination (*see, People v Hollman, supra*, at 191) and origin (*see, People v Carter, supra*, at slip opn pp 2-3). Contrary to defendant's claim, we consider Cuprill's question about luggage to be a legitimate part of the request for information commensurate with the evolving circumstances of this encounter. We find that the detention of the vehicle's occupants and the police inquiry about possible contraband items in the vehicle were justified by a founded suspicion that criminal activity was afoot (see, *People v Hollman, supra*; *People v Irizarry*, 79 NY2d 890, 892). We come to this conclusion based upon all of the attendant circumstances, including defendant's nervousness, his initial fragmented responses, his preoccupation with Cuprill's sidearm and the contradictory versions in reference to the particulars of the trip given by the occupants (see, *People v Carter, supra*, at slip opn pp 2-3).

Additionally, we find that Jones' offer to the Troopers to "go ahead and look" and the absence of an objection from the one passenger possessed with the presumptive authority to object (*cf., People v Carter, supra*) justified their good-faith reliance upon the driver's authority to consent to a search of

the vehicle (*see, People v Adams,* 53 NY2d 1, 9, *cert denied* 454 US 854; *see also, People v Carter, supra*). Accordingly, we find that County Court properly denied defendant's suppression motion.

White and Weiss, JJ., concur.

MERCURE, J. (dissenting).

We dissent. Even accepting the majority's finding that the initial stop of the vehicle was lawful (*see, People v Ellis,* 62 NY2d 393, 396), it is our view that Trooper Carlos Cuprill's subsequent conduct of requiring the occupants to separately exit the vehicle and submit to questioning about matters wholly unrelated to the vehicular violation exceeded acceptable constitutional bounds. It is fundamental that when a police officer is acting in a law enforcement capacity, his right to ask questions hinges on the manner and intensity of the interference, the gravity of the offense and the circumstances attending the encounter (*see, People v Hollman,* 79 NY2d 181, 189; *People v De Bour,* 40 NY2d 210, 219). The stop of a vehicle for a minor traffic infraction of itself arouses very little, if any, suspicion of criminality and justifies a correspondingly limited intrusion. There is no justification in such a case for questioning about any matters unrelated to the vehicular violation itself (*see, People v Woods,* 189 AD2d 838, 842; *People v Guzman,* 153 AD2d 320, 322, *appeal dismissed* 76 NY2d 824, *cert denied* ___ US ___, 111 S Ct 2234). Surely, a seat belt violation, at or very near the bottom of New York's penal hierarchy, committed in the presence of a police officer requires little investigation in order to develop an overwhelming case against the offender. Aside from the information to be garnered from the subject's license, registration and insurance card (*see,* Vehicle and Traffic Law § 401 [4]) and a subsequent routine license and registration check, we are at a loss as to any relevant area of inquiry (*see, People v Alexander,* 189 AD2d 189, 194-195).

In any event, Cuprill's questions as to defendant and codefendant Robert K. Jones' point of origin and destination and

whether they had luggage in the trunk had no bearing upon the offense and were, accordingly, impermissible.[2] Of even greater significance, in the absence of a founded suspicion of criminality, Cuprill had absolutely no justification for asking whether there were "any guns, weapons or drugs in the car" (*see, People v Hollman, supra*, at 191-192; *People v Alexander, supra*, at 195; *People v Woods, supra*, at 842; *People v Guzman, supra*, at 322), the question that allegedly resulted in the consent to search. To the contrary, after defendant and Jones produced operator's licenses and the auto rental papers and the computer check came back negative, Cuprill should have issued tickets for violations of Vehicle and Traffic Law § 1229-c and sent defendant and codefendant on their way, (*see, People v Guzman, supra*, at 323).

Because the consent to search was the product of impermissible police conduct, the evidence derived therefrom should have been suppressed (*see, People v Woods, supra*, at 843; *People v Guzman, supra*, at 324). Accordingly, we would reverse the judgment of conviction, grant defendant's motion to suppress and dismiss the indictment.

Casey, J., concurs.

ORDERED that the judgment is affirmed.

ENTER:

/s/ MICHAEL J. NOVACK
Michael J. Novack
Clerk

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[2] We are not at all persuaded by the majority's reliance upon *People v Hollman* (*supra*) and *People v Carter* (___ AD2d ___ [Dec. 30, 1993]) as authorizing inquiry of a traveling motorist stopped for a minor traffic infraction concerning his point of origin and destination. *People v Hollman* (*supra*) involved a street encounter in which an individual was approached for "an articulable reason" (*id.*, at 191), a situation very different than that present here. In *People v Carter* (*supra*), the defendant did not raise and this court did not consider the issue.

STATE OF NEW YORK

SUPREME COURT
COUNTY OF ALBANY

Indictment No. 25-3307

THE PEOPLE OF THE STATE OF NEW YORK

—against—

PORTER F. BANKS, JR. and ROBERT K. JONES,

Defendant.

APPEARANCES:

For the People:

HON. SOL GREENBERG
Albany County District Attorney
Albany County Courthouse
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Albany, New York 12207

OF COUNSEL:

RICHARD S. HARTUNIAN
Assistant District Attorney

For the Defendant—Porter F. Banks, Jr.:

Thomas Marcelle, Esq.
11 North Pearl Street
Albany, New York 12207

For the Defendant—Robert Jones:

Hill & McCready
543 Franklin Street
Buffalo, New York 14202
Sean Dennis Hill, Esq.

DECISION AND ORDER

KEEGAN, J. The defendants, Robert K. Jones and Porter F. Banks, Jr., are charged in the indictment with one count each of Criminal Possession of a Controlled Substance in the First Degree, in violation of § 220.21(1) of the Penal Law. Defendant Jones is also charged with one count of Criminal Impersonation in the Second Degree, in violation of § 190.25(1) of the Penal Law.

Defendants claim to be aggrieved by an improper search and seizure of evidence. Defendant Jones also claims to be aggrieved by the improper taking of his statements.

A hearing was held before this Court on March 25, 1992. The People called one witness, Trooper Carlos Cuprill, of the New York State Police. Defendants did not call any witnesses, nor did they testify on their own behalf.

The Court makes the following findings of fact:

On September 14, 1991, at approximately 1:00 p.m., Trooper Carlos Cuprill, while on routine road patrol of the New York State Thruway, observed defendants' car traveling at approximately 54 mph in the northbound lane. Trooper Cuprill, noticing that the driver of the vehicle was not wearing a seat belt, pulled the vehicle over about 2 miles from the point of initial observation. Upon stopping the vehicle, the Trooper observed another individual in the front passenger seat, who had apparently been sleeping or resting. This individual also was not wearing a seat belt.

The Trooper requested the driver of the vehicle to exit and come to the rear of the vehicle because of the heavy volume

of traffic at that time. He asked the driver for his license and registration; the driver produced a rental document for the vehicle, which indicated it had been rented by a Porter Banks. He also produced a non-picture New York State license, which identified him as Thomas Cooper (he is now identified as defendant Robert Jones).

Cuprill explained to Jones that both he and his passenger were stopped and would be ticketed for violation of the seat belt law.

The Trooper described Jones as very calm and cooperative during this time. The Trooper then proceeded to question Jones about where he was coming from and where he was going. In response to these questions, Jones stated that he was coming from the New York City area and was enroute to Buffalo, having just dropped his niece at college. Cuprill testified that defendant Jones said that he had made the trip in one day.

Cuprill, after instructing Jones to return to his vehicle, approached the passenger side and requested that individual (now identified as defendant Banks) to exit and come to the rear of the vehicle. The Trooper described the 300 lbs. Banks as very nervous and highly agitated. Banks produced a valid New York State photo driver's license. When he was asked by Cuprill if he was coming from New York or New Jersey, he replied "yes." Banks indicated that he had spent a couple of days in the New York City area with Jones visiting friends. Cuprill also asked Banks if he had any luggage.

Trooper Cuprill testified that during this time, Banks kept scanning his sidearm and that even after he changed his stance to cover his sidearm, Banks continued looking at his gun. Cuprill stated that he was very nervous and feared for his safety, even though he had no reason to believe that Banks himself was armed. The Trooper asked Banks to return to the rented vehicle, and he returned to his patrol car where he ran a suspension and revocation check on the licenses of "Thomas Cooper" and Porter Banks, and a check on the vehicle itself. The results of these checks were negative.

At this point, the Trooper started to write out tickets for both individuals for seat belt violations. He also radioed Trooper Darren Donnelly, requesting his assistance in "a possible vehicle search."

Upon Trooper Donnelly's arrival, Cuprill requested that defendant Jones again exit the vehicle and come back to the patrol car. Cuprill issued both tickets to Jones and then asked him if he had anything in the car he wasn't supposed to have, such as guns, weapons or drugs. Jones indicated that he did not and that they could go ahead and look. Cuprill then filled out a New York State consent to search form, and Jones, after appearing to read it, signed it as "Thomas Cooper."

At that time, Cuprill requested that defendant Banks exit the vehicle, both individuals were patted down for weapons; none were found.

During the course of the search, Cuprill found, under the driver's seat, a brown paper bag which held a clear plastic bag filled with a white powdery substance, which appeared to be cocaine. The defendants were then placed under arrest.

At the barracks, it was learned that "Thomas Cooper" was actually Robert Jones.

The Court makes the following conclusions of law:

Initially, the Court finds there was probable cause for the arrest of the defendants. *People v. Chapman*, 103 AD2d 494, 496.

The stop of defendant's vehicle for violation § 1229-c(3) of the Vehicle & Traffic Law was proper. *People v. Mikel*, 152 AD2d 603, 604-605; see also, *People v. Ingle*, 36 NY2d 413.

The initial questioning of the defendants by Trooper Cuprill concerning their identities, point of origin and destination were basic questions constituting a mere request for information. *People v. Hollman*, 79 NY2d 181; *People v. DeBour*, 40 NY2d 210.

The People contend that defendants' "conflicting" responses to Trooper Cuprill's questions, and Banks' agitated and nervous manner were enough to arouse the Trooper's suspicions that criminal activity was afoot, entitling him to make further

inquiry of defendant Jones. *DeBour,* at 223. This Court agrees. The discrepancies in the defendants' stories are certainly not as minor as the defendants would have us believe. Jones' characterization of the trip as a "one day trip" taken to drop his niece off at college, and Banks' characterization of its duration and purpose as a "couple of days" spent visiting friends could easily raise a suspicion in the trained police office that something was amiss. See, *People v. Hollman*, 79 NY2d 191. These discrepancies coupled with Banks' nervous and highly agitated manner during a minor traffic stop could and did raise a "reasonable" suspicion of criminality.

Defendant Banks further argues that defendant Jones, the driver of the vehicle, could not consent to its search, because the car had been rented in Banks' name. It is well settled that the police may lawfully conduct a warrantless search when they have obtained the voluntary consent of a person who possesses the requisite degree of authority over the property or premises in issue. In the instant matter, it was not unreasonable for Trooper Cuprill to assume that Jones, as the driver of the vehicle, had the apparent authority to consent to its search. *People v. Henley*, 53 NY2d 403; *People v. Adams*, 53 NY2d 1, 9; *People v. Cosme*, 48 NY2d 286.

Despite the fact that defendant Jones possessed the requisite authority to consent, his consent must still be examined to ascertain its validity. Consent to search is tested by examining the "voluntariness" of the consent under the totality of the circumstances. *Schneckloth v. Bustamonte*, 93 S.Ct. 2041. See also, *People v. Kuhn*, 33 NY2d 203. Consent to search ". . . is voluntary when it is a true act of will, an unequivocal product of an essentially free unconstrained choice. Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle." *People v. Gonzalez*, 39 NY2d 122, 128.

The Court of Appeals in *People v. Gonzalez* set forth four factors which are to be considered in assessing the voluntariness of the consent. No one circumstance is determinative of voluntariness of consent. Rather, voluntariness must be determined under the totality of the circumstances.

The first factor is ". . . whether the consenter is in custody or under arrest, and the circumstances surrounding the custody or arrest." *People v. Gonzalez* at 128. In the present case, defendant Jones was not placed under arrest, nor was he in custody, at the time.

The second factor to be examined by the court in determining the voluntariness of the consent is the background of the consenter. There is nothing to indicate that defendant Jones did not comprehend the officer's request. *People v. Gonzalez* at 128.

The third factor in determining the voluntariness of consent is ". . . whether the consenter has been . . . evasive or uncooperative with the law enforcement authorities." *Gonzalez* at 129. Defendant Jones not only told the Trooper to go ahead and look, but also read and signed a voluntary consent to search form.

The fourth and final factor in assessing consent is whether the person giving the consent was advised of his right to refuse to consent.

In the case at bar, there was no testimony to indicate that the defendant Jones was advised of his right to refuse consent, but "while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. *People v. Kuhn*, 33 NY2d 203, 209.

Additionally, it should be noted that the defense counsel made no claim of police pressure or deception. Further, there is no contention that the passenger in question misunderstood what was occurring.

Thus, in light of the foregoing, the evidence in the present case compels the conclusion that defendant Jones, the driver of the vehicle, had the requisite authority to consent and that he voluntarily consented to the search of the vehicle. Accordingly, the evidence seized form the vehicle is admissible.

Defendant Jones' statements to Trooper Cuprill at the scene were made in response to valid inquires by the Trooper and are, therefore, admissible. He was not in custody, and there-

fore, the *Miranda* warnings were not required. *People v. Fiorello,* 140 AD2d 708. Thus, defendants' motions to suppress are denied in all respects.

This shall constitute both the Decision and Order of this Court.

Dated: Albany, New York
August 12, 1992.

/s/ THOMAS W. KEEGAN, J.S.C.
Thomas W. Keegan, J.S.C.

COUNTY COURT—COUNTY OF ALBANY

FILE NOS. D911962
D911961

NOVEMBER 6, 1991
SEPTEMBER TERM

THE PEOPLE OF THE STATE OF NEW YORK

—against—

ROBERT K. JONES, and PORTER F. BANKS,

Defendants.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

FIRST COUNT:

Criminal Possession of a Controlled Substance in the First Degree, in violation of Section 220.21(1) of the Penal Law of the State of New York, a Class A-I Felony, in that the defendants, on or about the 14th day of September, 1991, at approximately 1:31 P.M., on the New York State Thruway, I-87, at approximate milepost marker 136, in the Town of Bethlehem, County of Albany, State of New York, did knowingly and unlawfully possess one or more preparations, compounds, mixtures or substances of an aggregate weight of four ounces or more containing a narcotic drug, to wit: at the

aforesaid date, time and place, the defendants did possess four ounces or more of cocaine.

/s/ [ILLEGIBLE]
Assistant District Attorney

COUNTY COURT—COUNTY OF ALBANY

FILE NO. D911962

NOVEMBER 6, 1991
SEPTEMBER TERM

THE PEOPLE OF THE STATE OF NEW YORK

—against—

ROBERT K. JONES,

Defendant.

The Grand Jury of the County of Albany, New York, by this Indictment accuses the defendant of the following crime:

SECOND COUNT:

Criminal Impersonation in the Second Degree, in violation of Section 190.25(1) of the Penal Law of the State of New York, a Class A Misdemeanor, in that the defendant, on or about the 14th day of September, 1991, at approximately 1:31 P.M., on the New York State Thruway, I-87 at approximate milepost marker 136, in the Town of Bethlehem, County of Albany, State of New York, did knowingly impersonate another and did act in such assumed character with intent to obtain a benefit or to injure or defraud another, to wit: at the aforesaid date, time and place, with intent to defraud New York State Trooper Carlos Cupril and to obtain the benefit of

avoiding detection of being unlicensed, the defendant did impersonate another, one Thomas W. Cooper.

_____

Assistant District Attorney

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Judith S. Kaye, Chief Judge, Presiding

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3 No. 75

The People &c.,

Respondent,

v.

Porter F. Banks,

Appellant.

The appellant in the above entitled appeal appealed by Michael H. Sussman, Esq.;
the respondent appeared by Hon. Sol Greenberg, District Attorney, Albany County.

The Court, after due deliberation, orders and adjudges that the order is reversed, defendant's motion to suppress granted and indictment dismissed. Opinion by Judge Levine. Chief Judge Kaye and Judges Simons, Titone, Bellacosa, Smith and Ciparick concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Albany County Court there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ DONALD M. SHERAW
Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 4, 1995.

§ 155. Traffic infraction.

The violation of any provision of this chapter, except articles forty-seven and forty-eight, or of any law, ordinance, order, rule or regulation regulating traffic which is not declared by this chapter or other law of this state to be a misdemeanor or a felony. A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof. This definition shall be retroactive and shall apply to all acts and violations heretofore committed where such acts and violations would, if committed subsequent to the taking effect of this section, be included within the meaning of the term "traffic infraction" as herein defined. Except in those portions of Suffolk county for which a district court has been established, outside of cities having a population in excess of two hundred thousand in which administrative tribunals have heretofore been established, courts and judicial officers heretofore having jurisdiction over such violations shall continue to do so and for such purpose such violations shall be deemed misdemeanors and all provisions of law relating to misdemeanors except as provided in section eighteen hundred five of this chapter and except as herein otherwise expressly provided shall apply except that no jury trial shall be allowed for traffic infractions. In those portions of Suffolk county for which a district court has been established, and in cities having a population in excess of two hundred thousand in which administrative tribunals have heretofore been established, the criminal courts of such cities or portions of Suffolk county in which a district court has been established shall have jurisdiction to hear and determine any complaint alleging a violation constituting a traffic infraction, except that administrative tribunals heretofore established in such cities or portions of Suffolk county in which a district court has been established shall have jurisdiction to hear and determine any charge of an offense which is a traffic infraction, except parking, standing or stopping. In cities having a population in excess of two hundred thousand

in which administrative tribunals have heretofore been established, and any such administrative tribunal established by the city of Yonkers, or the city of Peekskill, such tribunals shall have jurisdiction to hear and determine any charge of an offense which is a parking, standing or stopping violation. Any fine imposed by an administrative tribunal shall be a civil penalty. For purposes of arrest without a warrant, pursuant to article one hundred forty of the criminal procedure law, a traffic infraction shall be deemed an offense.

§ 1229-c. Operation of vehicles with safety seats and safety belts.

1. No person shall operate a motor vehicle in this state unless all back seat passengers of such vehicle under the age of four are restrained in a specially designed seat which meets the Federal Motor Vehicle Safety Standards set forth in 49 C.F.R. 571.213 and which is either permanently affixed or is affixed to such vehicle by a safety belt or in the case of any other passenger under the age of ten, he is restrained by a safety belt approved by the commissioner.

2. No person shall operate a motor vehicle unless all front seat passengers under the age of sixteen are restrained by a safety belt or, if they are under the age of four, by a specially designed sent which is either permanently affixed or affixed to such vehicle by a safety belt as required by subdivision one of this section.

3. No person shall operate a motor vehicle unless such person is restrained by a safety belt approved by the commissioner. No person sixteen years of age or over shall be a passenger in the front seat of a motor vehicle unless such person is restrained by a safety belt approved by the commissioner.

4. For the purposes of this section, the term "motor vehicle" shall include all motor vehicles which are required by section three hundred eighty-three of this chapter or regulation or would be required if such motor vehicle were registered in New York state to be equipped by a safety belt but

shall not include those vehicles which are used as school buses, as such term is defined in section one hundred forty-two of this chapter and those vehicles which are authorized emergency vehicles, as such term is defined in section one hundred one of this chapter.

5. Any person who violates the provisions of subdivision three of this section shall be punished by a civil fine of up to fifty dollars. Any person who violates the provisions of subdivision one, two or eleven of this section shall be punished by a civil fine of not less than twenty-five nor more than one hundred dollars.

6. The court shall waive any fine for which a person who violates the provisions of this section would be liable with respect to passengers under the age of four if such person supplies the court with proof that, between the date on which he is charged with having violated this section and the appearance date for such violation, he purchased or rented a child seating system which meets the requirements of subdivision one of this section. Provided, however, that such waiver of fine shall not apply to a second or subsequent conviction under this section.

7. The provisions of this section shall not apply to a passenger or operator with a physically disabling condition whose physical disability would prevent appropriate restraint in such safety seat or safety belt provided, however, such condition is duly certified by a physician who shall state the nature of the handicap, as well as the reason such restraint is inappropriate.

8. Non-compliance with the provisions of this section shall not be admissible as evidence in any civil action in a court of law in regard to the issue of liability but may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense.

9. Notwithstanding the provisions of subdivision four, this section shall not apply to taxis, liveries, tractors, trucks with

a maximum gross weight of eighteen thousand pounds or over, and buses other than school buses.

10. The provisions of this section shall not apply to persons employed as rural letter carriers, as defined by the United States postal service while such persons are discharging the duties of such employment.

11. Notwithstanding the provisions of subdivision four of this section, no person shall operate a school bus unless all passengers under the age of four are restrained in a specially designed detachable or removable seat as required by subdivision one of this section, or another restraining device approved by the commissioner.

12. (a) Every rental vehicle company, as defined in paragraph (d) of subdivision one of section three hundred ninety-six-z of the general business law, shall post a sign in their place of business which states in conspicuous lettering of at least seventy-two point boldface type:

NEW YORK STATE LAW REQUIRES ALL CHILDREN UNDER THE AGE OF FOUR TO BE RESTRAINED IN A FEDERALLY APPROVED CHILD SAFETY SEAT.

(b) Such sign shall be placed in an upright position and in a conspicuous place where it can easily be read by the clientele of the rental vehicle company.

(c) Any rental vehicle company which violates the provisions of this subdivision shall be subject to a civil penalty, not to exceed one hundred dollars for each day of violation.

§ 140.10. Arrest without a warrant; by police officer; when and where authorized.

1. Subject to the provisions of subdivision two, a police officer may arrest a person for:

(a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and

(b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

2. A police officer may arrest a person for a petty offense, pursuant to subdivision one, only when:

(a) Such offense was committed or believed by him to have been committed within the geographical area of such police officer's employment; and

(b) Such arrest is made in the county in which such offense was committed or believed to have been committed or in an adjoining county; except that the police officer may follow such person in continuous close pursuit, commencing either in the county in which the offense was or is believed to have been committed or in an adjoining county, in and through any county of the state, and may arrest him in any county in which he apprehends him.

3. A police officer may arrest a person for a crime, pursuant to subdivision one, whether or not such crime was committed within the geographical area of such police officer's employment, and he may make such arrest within the state, regardless of the situs of the commission of the crime. In addition, he may, if necessary, pursue such person outside the state and may arrest him in any state the laws of which contain provisions equivalent to those of section 140.55.

4. Notwithstanding any other provisions of this section, a police officer shall arrest a person, and shall not attempt to reconcile the parties or mediate, where such officer has reasonable cause to believe that:

(a) a felony, other than subdivisions three, four, nine or ten of section 155.30 of the penal law, has been committed by such person against a member of the same family or household, as defined in subdivision one of section 530.11 of this chapter; or

(b) a duly served order of protection is in effect, or an order of which the respondent or defendant has actual knowl-

edge because he was present in court when such order was issued; and

(i) Such order directs that the respondent or defendant stay away from persons on whose behalf the order of protection has been issued and the respondent or defendant committed an act or acts in violation of such "stay away" provision of such order; or

(ii) The respondent or defendant commits a family offense as defined in subdivision one of section eight hundred twelve of the family court act or section 530.12 of this chapter in violation of such order of protection.

The provisions of this subdivision shall apply only to orders of protection issued pursuant to sections two hundred forty and two hundred fifty-two of the domestic relations law, articles four, five, six and eight of the family court act and section 530.12 of this chapter; or

(c) a misdemeanor constituting a family offense, as described in subdivision one of section 530.11 of this chapter and section eight hundred twelve of the family court act, has been committed by such person against such family or household member, unless the victim requests otherwise. The officer shall not inquire as to whether the victim seeks an arrest of such person.

Nothing contained in this subdivision shall be deemed to restrict or impair the authority of any municipality, political subdivision, or the division of state police from promulgating rules, regulations and policies requiring the arrest of persons in additional circumstances where domestic violence has allegedly occurred.

No cause of action for damages shall arise in favor of any person by reason of any arrest made by a police officer pursuant to this subdivision, except as provided in sections seventeen and eighteen of the public officers law and sections fifty-k, fifty-l, fifty-m and fifty-n of the general municipal law, as appropriate.

5. Upon investigating a report of a crime or offense between members of the same family or household as such

terms are defined in section 530.11 of this chapter and section eight hundred twelve of the family court act, a law enforcement officer shall prepare and file a written report of the incident, on a form promulgated pursuant to section eight hundred thirty-seven of the executive law, including statements made by the victim and by any witnesses, and make any additional reports required by local law enforcement policy or regulations. Such report shall be prepared and filed, whether or not an arrest is made as a result of the officers' investigation, and shall be retained by the law enforcement agency for a period of not less than four years.